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July 21, 2006

Honorable James Orenstein
United States District Court
United States Courthouse
225 Cadman Place East
Brooklyn, NY 11201

Re: In re Holocaust Victim Assets Litigation, No. CV-06-983(ERK)(JO)
Fee Application of Burt Neuborne

Dear Magistrate Judge Orenstein:

In accordance with your direction at the Conference on May 18, 2006, I submit this Letter Brief in support of the position of the Settlement Class in the above matter. Contemporaneously herewith, I have filed a Declaration regarding certain factual matters I also wish to confirm the Stipulation reached in this matter among all counsel to resolve factual disputes over Mr. Neuborne's time. The Stipulation provides that 1500 hours of time are excluded and another 800 hours are attributable to time acting as the Court's general counsel.

I. Class Notice is Mandatory[1]

The Court is precluded from awarding attorneys fees until there has been class notice and an opportunity to comment. Rule 23(h)(1), which became effective in 2003, states "[n]otice of the motion [for award of attorneys fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." This language is mandatory, not precatory. Although notice to class members was given in 1999 or 2000 as to fees that might be sought up to that time, the current Application cannot be grandfathered to that notice. The substantial fees sought here are for work performed subsequent to the signing of the Settlement Agreement and were not contemplated by the earlier notice. Furthermore, an additional three fee petitions have been filed by other counsel seeking millions of dollars in fees and costs for post-settlement work.

The amendments to Rule 23 were adopted in part because of the outcry against "coupon" settlements, and Rule 23(h)(1) was part of the remedy. In "coupon" settlements, class members receive "coupons" for redemption and counsel receive a fee in cash. For over 100,000 class

[1] Unless your Honor believes that this issue has been decided by Chief Judge Korman, it is ripe for decision by your Honor at this time.

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members -- members of the Looted Assets Subclass -- the settlement was fair, but the allocation does not even give them a coupon. They released all of Switzerland from their claims, but will get neither payment on their claims nor a *cy pres* award. If no class notice is given, they will neither know about nor have the opportunity to object to Mr. Neuborne receiving over $4 million in fees. This is contrary to the Congressional intent of the Rule 23 amendments.

Courts have held that Rule 23(h)(1) applies to lawsuits filed before enactment of the Rule. *See In re Livent, Inc. Noteholders Securities Litigation*, 270 F.Supp.2d 722 (S.D.N.Y. 2005). In *Cobell v. Norton*, 229 F.R.D. 5, 20-21 (D.D.C. 2005) the court explained that notice was required fpr all fee petitions:

> Rule 23(h)(1) requires that claims "for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2)" and that "[n]otice of [such] motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Rule 23(h)(1). Though the plaintiffs' interim fee request was filed as a petition under the Equal Access to Justice Act rather than as a Rule 54(d)(2) motion, the Advisory Committee notes emphasize that Rule 23(h)(1) was intended to "provide[ ] a format for all awards of attorney fees and nontaxable costs in connection with a class action[.]" Notice to the class of all fee motions is required, the Advisory Committee explains, because "[f]ee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions," such that "members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party[.]"
> The Rule 23(h)(1) notice requirement provides the class with sufficient information to question objectionable fee requests and to scrutinize any potential conflicts of interest that arise from certain payment scenarios, and these benefits do not vary with the procedural mechanism by which fees are sought. Rule 23(h)(1)'s purpose thus dictates that class members must be notified of any fee request made by class counsel regardless of the provision of law authorizing the request, including the plaintiffs' interim fee petition.

Class Counsel are concerned that the cost of class notice would be significant to a Class of over 500,000.[2] However, class notice under Rule 23(h)(1) is a component of due process; Congress did not create exceptions based on relative cost. The most efficient solution in this case is to fashion a new class notice which serves a dual function: informing the class of the status of settlement distribution and the rulings of the Court of Appeals as well as the multiple

[2] There are more than 500,000 persons worldwide who responded to the 20-page questionnaire sent by the Court in 1999 or 2000 indicating that they were class members. The specialists employed by the Court to give class notice in the past recommend that any new class notice be given by mail to the database of questionnaire respondents, and the notice include an update on the status of the distribution. They estimate the cost of mailing a double-sided letter to the database as between $560,000 and $600,000. Some savings could be realized in the postage component (approx. $260,000) by using a postcard format in the United States and Canada. They regard posting on the class' website as inadequate notice by itself, pointing out that in February 2006 there were only 5,600 "hits" on the website and there is no way of determining how many were by class members versus members of the general public.

applications for counsel fees. Contrary to the argument of Morris Ratner, it is not unusual for class members to receive more than a single class notice, especially in cases where collection or allocation of proceeds is at issue. In this case Lead Settlement Counsel has improperly shut off class members, especially members of the Looted Assets subclass, from information about allocation and cy pres issues for six years.

II. Judicial Estoppel and Waiver Bar Any Recovery of Fees

The Class joins in the arguments asserted by individual objectors represented by Mr. Dubbin that payment to Mr. Neuborne is barred by the doctrines of waiver and judicial estoppel. In connection therewith, the Class reiterates its arguments that Mr. Neuborne failed to disclose to the Class and co-counsel his secret arrangement with the Court that he would be compensated for his time. *See* Class Superseding Memorandum of Law (ECF Doc. No. 41) at pages 3-5.

III. Mr. Neuborne Cannot Recover from the Settlement Fund for Work as the Court's General Counsel

It has been stipulated that 800 hours, or approximately 10% of Mr. Neuborne's overall time, was devoted to acting as the Court's general counsel. *See* Memorandum Opinion of September 13, 2004. Chief Judge Korman has commented that he needed legal advice at multiple junctures in the case as well as a lawyer for "adversarial defense of my position in the Second Circuit." Indeed, Chief Judge Korman's reason for transferring the instant motion to Judge Block was that he needed to again consult with Mr. Neuborne.

It is not open for Mr. Neuborne to re-characterize these hours simply as the "defense" of the lower court's opinions. The stipulated 800 hours were devoted to advising, counseling and arguing on behalf of the lower court separate and independent of work for the Settlement Class. Otherwise, there is a factual dispute which undermines the Stipulation and requires an evidentiary hearing as to all anomalies in the detailed time submitted by Mr. Neuborne.

Putting aside (a) the implicit conflict in Mr. Neuborne serving both as Lead Settlement Counsel and undisclosed (until September 2004) general counsel to the Court, (b) *ex parte* meetings and phone calls with the Court and special master to discuss which subclasses to compensate and how much, and (c) the collapse of the adversarial system; the Class Settlement Fund should not be taxed for Mr. Neuborne's 800 hours. The undersigned understands that there is a fund available to the Court for compensating counsel who assist the Court, and the hourly rate is fixed by the Justice Department. There is even precedent for this approach in the Holocaust cases. David Boies was retained by the Court in the Southern District of New York in In re *Austrian, German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001) to perform services in the Court of Appeals in defending a mandamus action. His rate was $125 per hour. Mr. Neuborne should be compensated from that same fund for his time spent assisting the Court.

There is virtually no caselaw on this issue since normally a court has no authority to hire legal counsel to assist the court. The closest analogy is the hiring of a special master pursuant to Fed.R.Civ.P. 53. In *Reed v. Cleveland Board of Education*, 607 F.2d 737, (6th Cir. 1979), the court of appeals refused to require payment from the defendant to a law professor hired by the lower court as special master to advise it on legal matters in a desegregation case. A highly critical court of appeals stated:

> The use of masters is permitted because they improve the judicial process by bringing to the court skills and experience which courts frequently lack. However, courts are presumed to be informed on legal issues, and the determination of purely legal questions is the responsibility of the court itself. The court is not without assistance in performing this duty. The attorneys in a given case are required to inform the court of their views of the controlling law. Each district judge is provided at public expense with a staff which includes qualified law clerks. *** The court could rely on his own experience and learning and the assistance of his staff and all counsel in the case. The District Judge clearly had no intention to abdicate his judicial responsibility in this case. Nevertheless, to the extent that he relied on advice received in chambers from a "legal expert" there was a partial abdication of his role. *** He must depend on his own resources, which include the work of his staff and the offerings of counsel.

In the instant case Chief Judge Korman never appointed Mr. Neuborne as a special master so the compensation provisions of Rule 53 are inapplicable. If Mr. Neuborne is to be paid for his 800 hours, he must seek it from a fund other than the Class Settlement Fund. One source of that payment is the Administrative Office of the United States Court which Chief Judge Korman cited in his Memorandum Opinion of September 13, 2004 clarifying the role of Mr. Neuborne.

IV. The Hourly Rate Sought Is Excessive and Fails to Discount for Neuborne's *De Minimis* Overhead

The Class joins in the arguments asserted by individual objectors represented by Mr. Dubbin.

V. A Multiplier Cannot Be Awarded for Post-Settlement Work

Neuborne contends that his post-settlement work enhanced the Settlement Fund for which he is entitled to a multiplier for his efforts. However, based on his "agreement" with Chief Judge Korman that he would be paid for his services, Mr. Neuborne was never at risk that he would not be paid. Therefore his work was in no way contingent on the outcome or his compensation in jeopardy. Thus, the cases cited by him which award an excellence multiplier for at-risk, contingent, pre-settlement work are inapposite. Having been retained on an hourly basis, Mr. Neuborne cannot now change the terms of that representation..

Chief Judge Korman has himself refused to award any multiplier for post-settlement work, even work in negotiating the written Settlement Agreement, finding that payment of normal hourly rates is adequate compensation. *See In re Holocaust Victim Assets Litigation*, 270 F.Supp.2d 313, 325 (E.D.N.Y. 2002) The three other fee petitions which seek payment for post-settlement work do not seek any excellence multiplier.

In statutory fee shifting cases where payment of any fee was contingent and at risk, the United States Supreme Court has opined that the novelty and complexity of the litigation, the special skill and experience of counsel, the quality of representation and the results obtained are subsumed within the lodestar amount. *See Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). Where Mr. Neuborne's fee was never contingent or at risk, there is no basis for enhancement for any of these factors. An additional factor undermining any enhancement is the availability of other experienced counsel like the undersigned who were available to work *pro bono*.

VI. Conclusion

The Class requests that this Court stay any action on Mr. Neuborne's fee petition until class notice has been given, or deny any fees to Mr. Neuborne based on the doctrines of judicial estoppel and waiver. In the alternative, should the Court determine that Mr. Neuborne is entitled to a fee, the Class requests that a total of 2300 hours be excluded from Mr. Neuborne's lodestar and that any hourly rate not exceed $400. The Class does not object to payment of Mr. Neuborne's costs.

Respectfully yours,

Robert A. Swift

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